NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 93-10618
	)	
Plaintiff-Appellee,	)	D.C. No. CR-93-00040 -LDG
v.	)	
JAIRO LOZANO,	)	MEMORANDUM*
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted April 19, 1995**

Before: BROWNING, SNEED, and T.G. NELSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Jairo Lozano appeals his conviction following a conditional guilty plea to possessing with the intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Lozano contends that the district court erred by denying his suppression motion. We have jurisdiction under 18 U.S.C. § 1291.[1]/ We review the district court's denial of the motion to suppress de novo and its factual findings for clear error, United States v. Becker, 23 F.3d 1537, 1539 (9th Cir. 1994), and affirm.

Lozano contends he was unjustifiably detained after officers stopped him for speeding because they ordered him out of the truck he was driving for further questioning.

We review de novo whether a police officer's questions asked during an investigatory stop are based on reasonable suspicion. United States v. Perez, 37 F.3d 510, 513-14 (9th Cir. 1994). "Questions asked during an investigatory stop must be 'reasonably related in scope to the justification for their initiation.'" Id. at 513 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)). An officer may broaden his line of inquiry if he notices further suspicious factors that are both particularized and objective. Perez, 37 F.3d at 513; see United States v. Bautista, 684 F.2d 1286, 1290 (9th Cir. 1982), cert. denied, 459 U.S. 1211 (1983).

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[1]/ Because the government does not claim that the district court abused its discretion by finding that excusable neglect permitted the late filing of notice of appeal, see United States v. Prairie Pharmacy, Inc., 921 F.2d 211, 212-13 (9th Cir. 1990), we decline to review that finding.

Trooper Rosell Owens testified at the suppression hearing that after he stopped Lozano for speeding, he noticed a strong smell of fresh paint as he approached the truck. Paint came off where Owens touched the truck.[2]/ Lozano had a Texas driver's license that had recently been renewed, but he said he had been living in Missouri for the past nine months and was returning there from Los Angeles. Lozano did not know to whom the truck belonged, but said that Tambra Di-Lynn Herbin, the passenger, had borrowed it. Herbin was from Georgia. She said that Santos was the owner of the truck and that she had known him for a year, but she did not know his first name. The truck was registered in Missouri, in Santos's name.

All of Owens's questions were reasonably related to determining to whom the truck belonged. See Perez, 37 F.3d at 513. The answers to his questions gave Owens reasonable suspicion that the truck was stolen, and Owens justifiably ordered both Herbin and Lozano out of the truck for further questioning. See id. at 514 (reasonable suspicion permits further questioning where driver is not the vehicle's registered owner). We disagree with Lozano's claim that Owens acted unreasonably by separating Lozano and Herbin to question them. The suspicious and contradictory answers that Lozano and Herbin gave to the officers' questions did nothing to dispel a reasonable suspicion that Lozano and Herbin were involved in criminal activity. See Bautista, 684 F.2d at 1290-91. Although Herbin's testimony contradicted

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[2]/ Although Lozano contends on appeal that Owens illegally "seized" the paint by touching it, he has waived this issue by failing to include it in his suppression motion. See United States v. Restrepo-Rua, 815 F.2d 1327, 1328 (9th Cir. 1987).

Owens's at the suppression hearing, the district court[3]/ evidently believed Owens. Given Herbin's equivocal and contradictory testimony, the district court did not clearly err. See United States v. Ramos, 923 F.2d 1346, 1356 (9th Cir. 1991) (district court's credibility determinations reviewed for clear error); Bautista, 684 F.2d at 1290 (reviewing evidence at suppression hearing in light most favorable to government). Lozano's detention and questioning after the truck was topped were therefore permissible. See Perez, 37 F.3d at 513-14; Bautista, 684 F.2d at 1290-91.

Lozano next contends that Herbin did not have the apparent authority to consent to a search of the truck during Owens's questioning, and that her consent was invalid.

Common authority to consent to a search rests on mutual use of the property by a person having joint access or control for most purposes. United States v. Matlock, 415 U.s. 164, 171 n.7 (1974); see United States v. Dearing, 9 F.3d 1428, 1429 (9th Cir. 1993). A warrantless search is justified even if the third party does not possess actual authority to consent where the policy have reasonable grounds to believe that the consentor has authority to consent. See Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990); see also United States v. Welch, 4 F.3d 761, 764-65 (9th Cir.), cert. denied, 115 S. Ct. 607 (1994).

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[3]/ Because the district court adopted the magistrate judge's report and recommendation, we refer to both the district court and the magistrate judge as "the district court."

Lozano disclaimed knowing who owned the truck he was driving, referred Owens to Herbin, and stated that she borrowed the truck. Herbin said she knew the owner, and did not deny that she borrowed the truck. Although Lozano at some point changed his story and said that he borrowed the truck, Owens did not act reasonably by disbelieving him, given Lozano's inconsistent explanations. See Becker, 23 F.3d at 1539. Lozano did not object to the search of the truck, permitting Owens to believe that Herbin had the authority to consent. See Welch, 4 F.3d at 764. We reject Lozano's suggestion that Owens should have investigated further before obtaining consent from Herbin because Owens had sufficient information indicating that Herbin borrowed the truck. See id. at 764-65.

The district court held that the police officers who searched Lozano's truck "acted reasonably" by determining that Herbin had legal custody of the truck, and thus found that Herbin had apparent authority to consent to the truck search. We find no error, under either the clear error or de novo standard of review. See Dearing, 9 F.3d at 1429-30 (noting that Ninth Circuit has not decided if apparent authority determinations are subject to clearly erroneous or de novo standards of review).

Lozano failed to show that Herbin's consent was involuntary. Owens's actions were not coercive. He spoke softly to Herbin and did not threaten her. He did not draw his gun, use force, or handcuff her before she consented. Owens did not state that he had the authority to search with or without her consent. The district court did not clearly err by finding her consent voluntary. See United States v.

Cannon, 29 F.3d 472, 477 (9th Cir. 1994); Kim, 25 F.3d at 1432.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CR-S-93-040-LDG (RJJ)
JAIRO LOZANO,	)	
Defendant.	)	

ORDER

This matter is before the court on Defendant's Motion to Suppress (#8). The government Responded (#10). After a four-day hearing, Magistrate Johnston submitted a Report & Recommendation (#26) recommending denial of the motion. Defendant has timely Objected to the Report & Recommendation (#27). A hearing on the matter was held by this court on May 24, 1993.

This case involves the stop of a vehicle and the eventual discovery of 110 kilos of cocaine in a secret compartment in that vehicle. Defendant argues that the evidence should be suppressed because the stop was pretextual, there was no probable cause to further detain Defendant after the traffic stop, and that the third-party consent to search the vehicle was invalid.

I. Pretextual Stop

Defendant argues that the NHP officer that pulled him over did so as a pretext to search for drugs. The case of United States v. Lillard, 929 F.2d 500 (9th Cir. 1991), is convincing in this matter. In Lillard, the officer stated that the reason he pulled the defendant over was that he was under suspicion of possible drug manufacturing and he was speeding and driving carelessly. The Ninth Circuit held that, because it was undisputed that the defendant was speeding and driving carelessly in violation of the law, and the officer testified that he would have pulled him over based on the traffic violations alone, the officer's knowledge of the suspected drug manufacturing did not make the stop pretextual. Id. at 502.

In this matter, Defendant alleges that the trooper who pulled him over was a member of a force working in conjunction with the DEA and thus had a subjective motivation outside any traffic violation to stop Defendant. The testimony of the trooper was that he noticed the truck because it had what he thought was an unusual license tag and pulled it over because it was doing 73 mph in a 65 mph zone on a dark and rainy night. As noted by the Magistrate, there is no indication from the trooper's testimony that the Defendant was pulled over for any reason other than the fact that he was speeding. It is clear that the speeding violation was a sufficiently lawful reason to stop the vehicle. United States v. Gutierrez-Meredos, 965 F.2d 800, 803 (9th Cir. 1992).

The Lillard case also makes it clear that even if the trooper did have a subjective suspicion or hunch that the truck was carrying contraband, the traffic violation alone

was sufficient to make the stop lawful and not based on any pretext. Therefore, the stop was lawful.

II. Reasonable Suspicion to Detain

Defendant argues that after he had been stopped for speeding, the troopers exceeded the scope of the traffic stop by detaining him longer than was necessary to write the citation. The United States Supreme Court has found that a police officer can stop and briefly detain a person for investigatory purposes without probable cause if the officer has a reasonable suspicion supported by articulable facts that criminal activity is afoot. United States v. Sokolow, 490 U.S. 1, 7 (1989).

In this case, trooper Owens testified that upon approaching the truck he smelled what he believed to be fresh paint. When the truck was stopped and the trooper asked for license and registration, Defendant surrendered his license and the passenger, Tambra DiLynn Herbin, retrieved the registration from the glove box. Although the truck was registered to a Rogue Santos in Missouri, Defendant produced a Texas driver's license. The trooper testified that when he asked whose truck it was, Defendant said he didn't know and that it belonged to a friend of Herbin's. The trooper then took Defendant to the back of the truck and asked him a few questions about where he was coming from and how he got the truck. Herbin was then asked the same questions and gave a conflicting account.

The court looks at the totality of the circumstances to determine whether an official detention has turned into an arrest. United States v. Del Vizo, 918 F.2d 1821, 1824 (9th Cir. 1990). The facts show that the driver of the vehicle was not the owner and he disclaimed knowledge of who the

owner was. The driver had a license from a different state than the state of registration. The trooper smelled fresh paint. When the troopers asked further questions to determine why the Defendant and Herbin were driving a vehicle that did not belong to them to a state where neither one of them resided, they received conflicting stories.

Based on the combination of these facts, the officer could have reasonably suspected that there was a criminal activity afoot. Thus, the court finds that the troopers were justified in detaining the Defendant up to the time Herbin granted consent to search the truck. Upon searching the cab of the truck, the troopers found instructions for painting a vehicle, new clothes, and insurance information indicating that over 15,000 miles had been put on the truck in the two months prior to the stop. This information, combined with the previous facts, was sufficient to provide probable cause that drugs could be found in the truck.

III. Third-Party Consent to Search

As noted above, Tambra DiLynn Herbin was riding in the truck with the Defendant. The troopers asked Herbin for permission to search the truck and she consented. Defendant argues that Herbin could not give consent to search because she was not driving and had no control over the truck. Further, he argues that even if she could consent, such consent was not voluntary because it was coerced.

The Ninth Circuit has held that a third-party who has joint access or control over property with others may authorize a search. United States v. Yarbrough, 852 F.2d 1522, 1534 (9th Cir.), cert. denied, 488 U.S. 866 (1988). The circuit has further held that an individual who has joint

access or control with another also "assumes the risk that the third part[y] might consent to the search." Id.

In this matter it is clear that Herbin had joint access to the cab of the truck in question. She was traveling with the Defendant, her personal effects were in the cab of the truck and she retrieved the registration from the glove box. All of these undisputed facts exhibit common control and access to the cab of the truck.

Defendant argues that it was improper for the troopers not to ask his consent, and that trooper Owens mechanically seeks consent from female passengers instead of from male drivers. It is true that no consent was ever sought from Defendant. This is not surprising since he disclaimed any interest in the truck. Also, even if Defendant had produced evidence at the hearing that trooper Owens engaged in the alleged practice - which he did not -this argument is without merit.

As noted by the Ninth Circuit in United States v. Childs, 944 F.2d 491 (9th Cir. 1991), the United States Supreme Court in United States v. Matlock, 415 U.S. 164 (1974) has held that officers are not necessarily required to seek consent from an owner or occupant present at the scene. Childs. 944 F.2d at 494, citing Matlock, 415 U.S. at 166. Instead, the Court found that a "co-occupant's consent, standing alone, was sufficient to permit a warrantless search." Id., citing Matlock, 415 U.S. at 171.

Therefore, given the facts, Herbin had a common control, or access to the cab of the truck and thus was a proper third-party to consent to the search of the cab of the truck. Therefore, the court's inquiry turns to the validity of the consent.

IV. Validity of Consent

The government has the burden of proving that consent to search was voluntarily given. United States v. Shaibu, 920 F.2d 1423, 1426 (9th Cir. 1990). It must show that there was no duress or coercion and that the consent was freely and intelligently given. Id.

Voluntariness of consent to search is reviewed based on the totality of the circumstances. United States v. Castillo, 866 F.2d 1071, 1082 (9th Cir. 1988) The court in Castillo set forth five factors which a court must consider in determining whether consent was voluntary; (1) whether defendant was in custody; (2) whether the officers had drawn their guns; (3) whether Miranda warnings had been given; (4) whether defendant was told he had the right not to consent; and (5) whether the defendant was told a search warrant could be obtained. Id. Nevertheless, the fact that some of the factors are not established will not automatically indicate that the consent was not voluntary. Id.

In this case, no Miranda warnings were given and Herbin was not told that she had the right not to consent. However, no show of force was made and there was no statement that a warrant could be obtained. Further, at the time consent was asked, Herbin was only being detained pursuant to a reasonable investigatory stop. Most importantly, the trooper testified that Herbin was calm and cooperative in giving consent to search and even offered to the trooper the information that there was a marijuana pipe in her purse which belonged to her sister.

At the hearing, Herbin gave a different version which stated that the troopers had told her that they knew there were drugs in the truck and that she better cooperate or she

would go to jail with Defendant. The Magistrate obviously found Herbin's testimony to be less than credible. The record indicates that Herbin's testimony during the hearing was inconsistent and that she frequently recanted portions of her statements on cross-examination. There was also testimony that Defendant had contacted Herbin before the hearing and informed her that she was his "last chance." Based on the credibility of the witnesses and the totality of the circumstances, the court agrees with the Magistrate's finding that the consent was voluntary.

Therefore, the court agrees with the findings of the Magistrate that the stop, detention and search of the vehicle were proper and that no Fourth Amendment violations occurred. Accordingly, good cause appearing,

IT IS HEREBY ORDERED that the Magistrate's Report & Recommendation (#26) is adopted and Defendant's Motion to Suppress (#8) is denied.

DATE: 31 May 1993

/s/ Lloyd D. George
LLOYD D. GEORGE
Chief United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,	) CR-S-93-40-LDG (RJJ)
Plaintiff,	) REPORT & RECOMMENDATION
vs.	) OF UNITED STATES MAGISTRATE JUDGE
JAIRO LOZANO,	)
Defendant.	) [Motion to Suppress (#8)]

This matter was submitted to the undersigned Magistrate Judge on defendant Jairo Lozano's Motion to Suppress Evidence and Statements (#8), and the Government's Response (#10). The court convened an evidentiary hearing on this matter April 14, 15, 19, and 20, 1993.

FACTS

On February 10, 1993, the Federal Grand Jury sitting in Las Vegas, Nevada, returned a Criminal Indictment (#1), charging Jairo Lozano with possession with intent to distribute one hundred ten (110) kilograms of cocaine, in violation of Title 21 U.S.C. § 841(a)(1). This indictment arose from Lozano's arrest by the Nevada Highway Patrol (NHP) on January 16, 1993, at approximately 8:30 p.m. on Interstate 15 near mile-marker 108.

Lozano and Tambra Di-Lynn Herbin were traveling northbound in a white 1990 Ford pickup truck bearing Missouri license plate number US3873. The license plate attracted the attention of NHP Trooper Rosell Owens who was driving his patrol car. It was foggy, dark and raining that evening and though Trooper Owens could not get a clear view of the occupants of the truck or the license plate, he found the plate unusual and thought it might be a dealer's plate. Trooper Owens also noticed that the truck was exceeding the speed limit and he pulled the truck over for this speeding violation. Trooper Owens was traveling with Trooper Ken Rowell and NLV Constable Jerry Schafer. Constable Schafer often rides with NHP Troopers to document their activities for law enforcement training films.

In response to questioning by Trooper Owens, the driver, Lozano, stated that he was on his way to Missouri where had he lived for nine months. Trooper Owens's suspicion was therefore heightened when Lozano produced a duplicate driver's license issued by the state of Texas (Exhibit 6) on January 7, 1993, and a vehicle registration in the name of Rogue F. Santos (Exhibit 1).

In viewing the truck, the Troopers noticed that the tailgate did not rest flush with the pickup bed and that the rear bumper did not appear to be at the proper level. They also noticed a pair of thin horizontal slits over the rear bumper near the license plate. Further examination after the consent to search was received revealed a secret compartment later found to contain 110 kilograms of cocaine.

DISCUSSION

Pretextual Stop

Lozano seeks to suppress the cocaine on the grounds that the NHP Troopers lacked adequate grounds to stop the truck. Lozano contends that the Trooper stopped the truck for speeding merely as a pretext to search for drugs and other contraband. United States v. Prism, 698 F.2d 972, 975 (9th Cir. 1983) (pretext to justify a search violates the Fourth Amendment). To support this position Lozano stresses that the Troopers did not simply cite and release Lozano for speeding, but instead questioned him, had him exit the truck, and ultimately searched the truck. Lozano argues that this subsequent action exceeds the behavior Troopers ordinarily take in stopping a vehicle for speeding.

However, there is no indication that the officers suspected Lozano of transporting narcotics and sought to search the truck prior to pulling him over. Instead it appears that Trooper Owens stopped Lozano for speeding and then noticed a variety of indicators which aroused his suspicion that other criminal activity was potentially afoot. United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) (motivation or primary purpose of arresting officer determines whether an arrest is pretextual).

Lozano argues that the Troopers had no reason to stop the truck. Yet the Troopers caught Lozano travelling 73 in a 65 mph zone.

Also, Lozano raises a weak claim of equal protection stemming from the fact that Lozano and the passenger, Herbin, are black, and that Lozano is a native of Costa Rica. The Troopers could not discern the race or nationality of the

occupants of the truck on the dark and foggy night in question before the speeding violation was established. This was not a pretextual stop.

Probable Cause

Probable cause is determined in light of the experience and training of the law enforcement officers. Trooper Owens noticed a variety of indicators which aroused his suspicions on January 16, 1993, to wit: unusual out of state license place, the failure of Lozano to make direct eye contact, the smell of fresh paint, the present of air fresheners in the cab, a driver's license and registration in different names, the disparity between an alleged Missouri residence and new Texas license, disclaimer of ownership over the truck, the amount and type of objects observed int he truck, and the high mileage put on the truck in a short period of time (Trooper Owens noted from the documentation provided to him and the odometer that the truck had traveled more than 15,000 miles in only two months). All of these factors prompted the Troopers to investigate further.

Lozano argues that no combination of legal behavior can give rise to probable cause. This is incorrect. Indeed, to believe otherwise would be to put the cart before the horse, and hold that officers only have probable cause after they detect conclusive evidence of criminal activity. Purely legal, but unusual or suspicious, behavior can create probable cause allowing further investigation.

Probable cause existed for the stop and the continued investigation by the NHP troopers.

Consent to Search

The Troopers based their search of the truck on the consent to search given by Herbin. Lozano argues first that Herbin did not have authority to give consent. He points out that Herbin was not driving the truck (in fact she does not drive at all, she has no driver's license from any state nor does she own any vehicles), never possessed keys to the truck, was not an owner of the truck, and therefore she never had custody or control over the truck. However, Lozano disclaimed any interest in the truck and referred them to Herbin who stated that she had borrowed the truck from a friend, Santos. Under these circumstances, the Troopers acted reasonably in determining that Herbin had legal custody of the truck.

Lozano argues that consent was not given because no one would knowingly give law enforcement agents to search a truck transporting cocaine. Yet, in light of the testimony and evidence presented, Lozano, apparently knowingly about the cocaine, disclaimed any interest in the truck, and Herbin, unaware of the cocaine and willing to cooperate with the Troopers, consent to a search by the Troopers. In fact, Herbin told the Troopers before they searched that the only possible contraband they might find would be a drug pipe in her purse belonging to her sister.

There was no coercion, force or intimidation used against Herbin in order to secure the consent to search. The consent was given freely and voluntarily.

RECOMMENDATION

Based on the foregoing, and good cause appearing therefore,

IT IS THE RECOMMENDATION of the undersigned Magistrate Judge that defendant Jairo Lozano's Motion to Suppress Evidence and Statements (#8) be denied.

NOTICE

Pursuant to Local Rule 510-2 any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within ten (10) days after service of this Notice. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986). This Circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991); Britt v. Simi Valley United Sch. Dist., 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 30th day of April, 1993.

/s/ Robert J. Johnston
ROBERT J. JOHNSTON
United States Magistrate Judge